CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

East'n. District. *June* 1816.

EASTERN DISTRICT, JUNE TERM 1816.

ALLARD vs. GANUSHEAU.

ALLARD vs. *GANUSHEAU.*

The appeal must be dismissed when there is neither statement of facts, special verdict, &c.

APPEAL from the first district.

The appeal in this case was dismissed, there being no statement of facts, bill of exceptions, or special verdict.

Moreau for the plaintiff. *Seghers* for the defendant.

BROU vs. *HERMAN.*

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FORSYTH & AL. vs. NASH.

Forsyth & al. vs. Nash.

A negro will be presumed free, tho' purchased as a slave, if the purchase was made in a country, in which slavery is not tolerated, unless it be shewn that he was before in one, in which it is.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiffs in this case claim the defendant, a negro man, as their slave. It therefore behooves them to show slavery *in him* and property *in them.**

The evidence adduced for this purpose is: 1, a bill of sale by which the defendant was sold to them "to have and to hold the said negro man, and to dispose of him, as they shall think proper." This instrument, bearing date the 5th of September, 1803, was executed at Detroit, in the territory of Michigan, was there recorded, and is duly authenticated.

2. The deposition of David Delaunay, who swears he knows a Mr. Forsyth, at St. Louis, whose christian name he is ignorant of, but knows not the other plaintiff; that there was at Detroit, a mercantile house, under the firm of Kinsey & Forsyth, but he is ignorant whether Mr. Forsyth of St. Louis be one of that house; that he saw the defendant at Mr. Forsyth's in

* But see *Trudeau's ex'x* vs. *Robinette*, January term 1817.

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St. Louis, but does not know to whom he belonged.

3. The deposition of Nicholas Girod, who swears that, while he was mayor of New-Orleans, the defendant was brought before him, and confessed he was a runaway and belonged to some person, the name of whom the witness does not recollect, who had promised him his freedom.

4. The deposition of A. B. Duchouquet, of St. Louis, who swore he never saw the defendant in the possession of the plaintiffs, because the plaintiffs lived at Peoria, in the Illinois territory; that the plaintiff, Forsyth, employed him in 1813, to stop the defendant; that he took him up in New-Orleans and brought him before the mayor, where he confessed he had ranaway from the plaintiffs, and did not like to return to them on account of a wife and children he had in New-Orleans.

5. The deposition of Pierre Le Vasseur, who knew the defendant in Peoria, in the Illinois territory, about ten years ago. He was known and reputed to be a slave; the witness knew him in the possession of Forsyth for four years. He ranaway from Peoria, about six years ago; the witness some time after met him at Prairie des Aspertuis, in the Illinois territory, and the defendant

said he was runaway from his master and was going to St. Louis.

On these facts the counsel contends that the slavery of the defendant and the property of the plaintiffs are fully proven.

I. The evidence of *slavery* resulting from the color of the defendant, *Adelle* vs. *Beauregard*, 1 *Martin* 183, from his declarations that he had a *master*, that he *belonged* to a man who had promised him his *freedom*, from his attempt to justify his unwillingness to return, by the circumstance of his having a wife and children in New-Orleans, thereby tacitly admitting the obligation he was under of returning to the plaintiffs.

II. The *property* of the plaintiffs is said to be proven by the bill of sale.

The defendant's counsel shews that in the territories of Michigan and the Illinois, the only places, except New-Orleans and St. Louis, which the defendant appears to have inhabited, *slavery does not exist*; that it is *forbidden by law*. The ordinance of congress of the year 1787, providing that "there shall be neither slavery nor involuntary servitude, in the said territory, otherwise than for the punishment of crimes, whereof the party shall have been convicted. Provided

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that any person *escaping into the same*, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her services as aforesaid."—Hence in the opinion of the counsel, a presumption arises that the defendant is free, which overweighs the contrary presumption which arises from the *color*.

It is further contended that as the bill of sale could convey no title, unless the defendant had been *duly convicted of a crime*, or in case he owed services in one of the original states, and *had escaped* into the Michigan territory, the plaintiffs are bound to bring the defendant within one of these two cases; that if the defendant was convicted of a crime, by which he became bound to involuntary services, the record of this conviction ought to be produced; so ought, in the other case, evidence of the duty of involuntary service, in one of the original states and of escape *into the territory*; that the apparent unlawfulness of the authority, exercised by the plaintiffs over the defendant, to which he may have submitted from his ignorance of his right or of the means of asserting it, is not repelled by his admission that he had a *master*, that he *belonged* to a person who had promised him his *freedom*.

For while it appears that the plaintiffs *de facto*, though not *de jure*, kept the defendant for a number of years in servitude, it cannot seem extraordinary that he should refer to them by the appellation of his *masters*, and the alleged promise of freedom may well be presumed to have been made to allure the defendant into submission. Neither is it said, can the admission of the defendant, that he *runaway* be received as conclusive evidence of a legal obligation to stay: flight from unlawful servitude being more generally resorted to, than the bold assertion of freedom. Kept for a number of years, perhaps from his birth, in bondage, the spirit of the injured negro is said to have been borne down, by the influence which long exerted mastery creates.

We are of opinion, that as the case affords no evidence of any residence of the defendant, in any country in which slavery is lawful, this case must be determined by the laws of the country in which the defendant dwelt when he came to the hands of the plaintiffs—that the ordinance of 1787, having proclaimed that slavery should not exist there, unless under two exceptions; the plaintiff must bring the defendant under either of them, and having failed to do so, must have their claim rejected.

Whenever a plaintiff demands by suit, that a

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person whom he brings into court as a defendant, and thereby admits to be in possession of his freedom, should be declared to be his slave, he must strictly make out his case. In this, if in any, *actore non probante absolvitur reus.*

Here the plaintiffs have failed in a very essential point, proof of the alleged slavery of the defendant.

Their title can only have been lawful, at the time the bill of sale produced was made, on two grounds: the right of the vendor, or the liability of the object of the sale, must have been absolute or qualified. *Absolute*, viz. complete ownership and slavery, in the sole case of conviction of a crime by which freedom was *forfeited*. *Qualified*, viz. the right of reclaiming and conveying the defendant out of the territory into one of the original states, in which he owed involuntary servitude or labour. This qualified right could only exist in the case of the defendant's *escape*.

Now, it cannot be contended that this qualified right only was disposed of: that, which is the evident object of the sale, is the absolute right *to have and to hold during the natural life and to dispose as they please.* The conduct of the plaintiffs, towards the defendant, shews that it was this absolute right which they considered themselves as the purchasers of. This they un-

lawfully attempted to, and did successfully for a number of years, exercise, till the defendant sought his safety in flight. Their title to him, if it exists, must be grounded on his conviction of a crime. Now the evidence of this, is *a matter of record*: the paper must be produced or accounted for.

The parish court erred in sustaining the plaintiff's claim. Its judgment is therefore annulled, avoided and reversed, and this court doth order, adjudge and decree, that there be judgment for the defendant with costs.

Morse for the plaintiff; *Moreau* for the defendant.

LABRANCHE vs. *WATKINS*.

A runaway slave cannot be sold by the sheriff till two years after the date of the advertisement.

If the sheriff sells the runaway and instantly takes a bill of sale from his vendee, for the same price, the sale will be presumed a fictitious one.

APPEAL from the second district.

MARTIN, J. delivered the opinion of the court. The plaintiff complains that the defendant detains his negro slave. The defendant answers, that the slave runaway and was delivered to him as jailer, that he advertised and detained him during the time prescribed by law, and finally sold him, after having obtained the permission of the parish judge, that he has since

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bought the vendee's title to the slave, under which he now holds him.

The facts, as agreed upon by the counsel of the parties, are these:

The slave was brought to jail on the 29th of July 1813, and on the 16th of August, the defendant wrote to a person in New-Orleans to advertise the negro three times, according to practice. There is no other evidence of any compliance with the defendant's directions in this respect, except a newspaper, bearing date of the 3d of September, 1813, and the 29th of August 1815, the sale took place. There is not any date to the petition of the defendant for the judge's leave, nor to the judge's order thereon. The only fact stated in this petition is "that the negro had been confined as a runaway two years, completed on the 29th of July, 1815." The compliance with any requisites of the law is not alleged; it is not stated that the negro was not claimed. The slave was sold by the defendant to Henry Wyatt, who immediately afterwards, viz. on the same day, conveyed all his rights therein for the price at which it was sold to him. The plaintiff produced a notarial act of sale, as evidence of his title, which does not appear to have been questioned.

On the 20th of September, 1814, he sent his son to claim the negro, with a letter to the parish judge, complaining that from the defendant's neglect to advertise the negro, as the law requires, he had not till then any knowledge of his confinement. Eighty dollars were offered to the defendant for his charges; but he claimed one hundred and eighty.

On the acknowledgment of the defendant's deputy that the negro had been advertised in one paper only, the parish judge made an order for his delivery, on payment of two months' expenses and the fees of arrest; but the defendant refused to deliver the negro thereon.

It is admitted that the negro was sick, that at the time of the plaintiff's application the doctor's bill amounted to eight dollars, and afterwards rose to forty one; that he was not confined, worked out, and attended the defendant's deputy as a servant.

On these facts, the district court gave judgment that the plaintiff recover the negro from the defendant, and one hundred and eighty five dollars and twenty five cents for his damages; and the defendant appealed.

His counsel contends that the order of the parish judge binds the plaintiff at least until it be reversed, on an appeal; and that the merits

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of the case cannot be collaterally inquired into. He relies on the cases of *Sheldon vs. Rusk & Bush*, 1 *Day* 170, and *Allen & al. vs. Hart, Kirby* 230.

In the first case, the court determined that the decree of a court of probates is *conclusive between the parties*, until disaffirmed or set aside on an appeal, in due course of law, and cannot be inquired into collaterally. In the second, the court held that the judgment of a county court declaring all the estate of the defendant forfeited, rendered on regular and legal process, and on due inquiry into the facts, by a court having jurisdiction of the case, should not be disregarded, although the court rendering it did not expressly state therein that the facts alleged were proven: this being strongly implied.

In the present case, the order of the parish judge cannot bind the plaintiff, for he was not a party thereto. He was not cited; neither does the case appear to be one in which the judge was authorised to act.

The 28th section of the first part of the black code provides that runaway slaves shall be advertised, in at least two newspapers, in French and English, during three months successively, and, after that time, once a month during the remainder of the year. They shall be employed

and kept at work for the county, by whom clothing, medicine, attendance and maintenance shall be found; but these expenses shall be discharged by the owner, when the negro cannot be usefully employed.

The next section provides that, if the owner do not reclaim the negro within two years from the date of the advertisement in the newspaper, in compliance with the preceding section, he shall be sold by the sheriff, with the permission of the judge, after *three* advertisements, for the payment of the charges, to be fixed by the judge.

Now the case under consideration does not appear, from the petition or order, to be one in which the sale could be ordered. The negro is stated to have been in jail two years: but the law allows only the sale of slaves who have been *unreclaimed* during two years, not after the arrest, but after the date of the first advertisement. The parish judge can only order the slaves advertised for one year, the case on paper does not shew that the negro was advertised at all.

Admitting even that the order justified the sale (which we clearly think it does not) the testimony on record shews that no legal sale has taken place. The defendant sold to himself—Wyatt lent his name.

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This fact results from the evidence spread on the record. A runaway negro is delivered to the jailor, who neglects advertising him according to law: the owner however hears of the capture of his slave, makes himself known, claims his property, tenders more than is due, yet the slave is withheld. The jailor obtains an order of sale, without any allegation or proof of the case being one in which the law authorises a sale: he sells the slave after *one* advertisement, while the law requires *three*, executes a deed of sale to a man, who instantly transfers all his right to the jailor.

We are of opinion that the order of sale was rendered in a case, in which the judge who granted it, from the very proceedings, does not appear to have had any authority to exercise. It consequently must be viewed as a nullity.

The defendant, from the testimony in the case, made a fraudulent attempt to divest the plaintiff from his title in the slave. The damages allowed to the latter, do not appear to us too high.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs; and the appeal being a frivolous

one, that the plaintiff do further recover ten per cent. on the amount of the judgment.

Livingston for the plaintiff; *Grymes* and *Duncan* for the defendant.

LEWIS vs. *FRAM.*

The purchaser of land, under execution, cannot claim back the money paid and require the delivery of his obligation for the balance, paying the money into court, on the ground that there were anterior incumbrances.

APPEAL from the first district.

DE[illegible]IGNY, J. delivered the opinion of the court. The appellant, plaintiff below, is the purchaser of a tract of land, sold by the sheriff by virtue of an execution, issued at the suit of the appellee. He has paid to the appellee part of the price, and the appellee holds his note or obligation for the balance. But as there exist some mortgages on that land, which the appellant thinks ought to be paid in preference to the appellee's judgment, he has brought this action to compel the appellee to refund the money by him received, and to give up the note which he holds, praying that his said obligation and the mortgage reserved in the sheriff's deed of sale be cancelled, upon his delivering into court the amount of the purchase money.

Before we examine into the merits of this action, it must be first ascertained whether or not

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the mortgages, which incumbered this property at the time of the purchase, were extinguished by the sheriff's sale; for should it be found that they have ceased to exist, the action would fall as ungrounded.

Pledges given to secure the payment of debts, are liable, as other rights, to be forfeited and lost in certain cases. In some countries, as in France for example, with a view to quiet the title of the purchaser, who buys real property at a judicial sale, certain solemnities have been established, which are intended as notice to all the world, that such a sale is about to be made, and which, when duly complied with, have the effect of extinguishing all incumbrances on the property sold. In Spain, the laws of which are ours, where not abrogated, the practice of giving general notice also prevails; but the neglect of the creditor to appear, when called only by publications, is not fatal to his interest.

Those alone, who have been called personally, are exposed to lose their pledge, if they don't come forward and assert their right, because they are then reputed in contumacy, and their silence is considered as a renunciation of their privilege. On this subject, see *Febrero de Juicios*, 6, 3, *ch.* 2, *sect.* 5, *n.* 340 & 341.

For the purpose then of quieting the purcha-

ser against the claims of privileged creditors, it was formerly the practice to communicate to them the proceedings had against the property encumbered. *(same author, book & chap. n. 327.)* The purchaser himself became a party so far as to see that they had due notice and sufficient time to appear; and then, and not until then, he deposited in the hands of the proper officer the purchase money, upon the tender of which the bill of sale was delivered him.

As to those who had been served with no notice, their lien on the property remained unimpaired. In equity, however, they were considered as bound to resort first, to the creditor who had received the proceeds of the sale, before they could disturb the purchaser.

The practice, in cases of execution, has been altered by statute, since the change of government; and the proceedings here related are now grown obsolete. But the principle, that the privilege of a creditor not duly called cannot be injured by a judicial sale, rests upon too solid ground, to be shaken by any change of practice or judicial proceedings. It is founded on that sacred maxim, that no one shall be condemned without being allowed an opportunity of defending himself.

There is then no doubt that the mortgage

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creditors, who appear not to have been made parties to the execution levied on the land bought by the appellant, have retained their liens on that property; and that the appellant is exposed to pay the amount of their claims.

We have now to examine whether the appellant may, under the existing circumstances, obtain the remedy which he prays for.

The appellant, as the highest bidder [illegible] mortgaged property, might perhaps, before paying the purchase money, have required notice to be given to the mortgage creditors, in order to secure himself against their claims. That precaution used formerly to be taken; and if nothing in our present judiciary system is opposed to that practice, (which we do not decide) it is perhaps desirable that it should again prevail. But after payment made to the suing creditor, we think it would be too late for the purchaser to require that the mortgage creditors be called in. Far less then, can we recognise any right in the purchaser to pretend that the money by him paid be refunded and deposited in court to wait the demands of the privileged creditors. Such practice is unknown to our laws, and would be attended with evident injustice. The right of the suing creditor to receive the pro-

ceeds of the sale and to keep them so long as other creditors do not interfere and show a higher title, is incontestible: none but such creditors can dispute him that right. They may never do so. Why then should he be deprived of his due, before it is known whether any such demand will be made?

The court are of opinion that the present action cannot be sustained; and they do adjudge and decree that the judgment of the district court be affirmed with costs.

Duncan for the plaintiff; *Livingston* for the defendant.

ENET vs. *HIS CREDITORS.*

APPEAL from the first district.

Privileged creditors are to vote for syndics.

DERBIGNY, J. delivered the opinion of the court. By a decree of this court, of the 7th of May last, *ante* 307, this case was sent back to the court of the fourth district, with instructions to the judge to cause another meeting of the creditors of Joseph Enet, to be held for the purpose of proceeding to the nomination of another syndic or syndics, the first appointment having appeared to this court to be illegal. The meeting

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took place, and the present appellants were elected: but the district judge refused to confirm their election, on the ground that part of the creditors, viz. those who had mortgages, had been denied the right of voting.

The question then, whether privileged and hypothecary creditors are or not to participate in the election of syndics, is the principal, if not the only, subject of investigation here.

The parish judge, acting as a notary on the occasion, thought that creditors of that description are excluded from voting by the 20th article of the 17th chapter of the ordinance of Bilbao, which says that, in case there should arise any difficulty in the settlement of accounts and other incidents or acts, until the close of the proceedings, the minority shall abide by the will of the majority: but that creditors, having privileges by deed or otherwise above the simple creditors shall not be admitted to vote. This article, however, does not seem to embrace the election of the persons, who are to be entrusted with the management of the bankrupt's estate, and with the settlement of his affairs: provision being made for their nomination, in the 12th and 13th articles of the same chapter. Administrators of the estate, under the name of

depositaires, are to be chosen by the majority of the creditors, (speaking generally and without exceptions) then syndics commissioners are to be appointed to take charge of the books and papers, to ascertain the number and claims of the creditors, with the active debts of the bankrupt and liquidate the whole. These are distinct trusts, unless it please the creditors to place them both in the same hands. After these nominations are provided for, we find in the 20th article, the disposition which gives to the simple creditors the exclusive right of debating among themselves, such difficulties as may occur in the settlement of accounts, and other incidents and acts. The reason of this is obvious: the privileged creditors, whose credits are liquidated, and who are to be paid at all events in full, have no interest in the adjustment of the other claims, nor in any measure which may be taken for the advantage of the ordinary creditors. But, it would have been strange indeed, had they been deprived of a participation in the choice of the persons, in whose hands that property is to be placed, out of which proceeds they expect to be paid. Be that as it may be, the ordinance of Bilbao, supposing it to have any binding force here in certain cases, is not the law which is to be consulted in matter of cession of goods.

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It is a part of the Spanish law-merchant, and is applicable only to traders. This is the case of a *cessio bonorum* by an individual not engaged in trade: it must be governed by the general rules provided for such cases.

Febrero, in the article quoted, when this cause first came before us, says that *all* the creditors or a majority of them in amount, not in number, are to make choice of the person to whom the administration of the estate is to be entrusted. The article of our code, quoted on the same occasion, gives to the creditors the right of naming syndics to have the management of the estate surrendered. The exclusion of the privileged creditors from a participation in that choice, is not so much as hinted at.

Another allegation of the appellants is, that one of the mortgage creditors, who complains that their v tes were refused, did not tender his, until after all the votes had been taken: but there is no evidence that the election was then closed. Besides, it appears that the determination of the notary, not to admit the votes of the hypothecary creditors had been made known, and that would be sufficient to excuse the creditor, even if he had admitted altogether the useless ceremony of tendering his vote.

The appellants have also made an attempt to

shew to this court, that since the judgment complained of, some of the creditors, in whose favour it was rendered, have thought fit to change sides, and are now willing to acquiesce in the nomination of the appellants as syndics. They even went so far as to establish, by calculation, what difference this would make in the result of all the votes. But this court could not, without assuming original jurisdiction, enquire into other circumstances than those which were laid before the judge, from whose decision an appeal was claimed. We must decide, and decide only, whether his judgment was or was not correct, at the time he pronounced it, not what it might have been, had the situation of the parties been different.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Moreau for the appellants; *Hiriart* for the appellees.

CLAY'S SYNDICS vs. *KIRKLAND.*

APPEAL from the third district.

When a commission issues by consent, the want of an affidavit to the materiality of the

MARTIN, J. delivered the opinion of the court. The plaintiffs offered to read the deposition of

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the insolvent, taken on a rule of court made for the examination of witnesses, by consent, on interrogatories; which the defendant opposed.

testimony cannot be urged.

1. Because there was no evidence of the materiality of the testimony.

No law requires the service of interrogatories on the adverse party.

2. Because the commission issued before service, on the defendant, of the filing of interrogatories.

The acts of another attorney, than the one originally named on the record, are not invalid.

3. Because the notice aforesaid was signed by another attorney than the one on record.

A ceding debtor cannot be used as a witness by his syndics.

4. Because the witness is an interested one: inasmuch as what may be recovered in the present suit will increase his estate, and on the contingency of it being more than sufficient to pay all his debts, a greater balance will accrue to him.

5. Because the testimony was taken contrary to the letter and spirit of the statute.

A witness who never saw the party write, but has frequently corresponded with him, may prove his handwriting.

The plaintiffs also offered in evidence a letter written by the defendant's wife, which the defendant objected to,

6. Because it was not written by her: the proof offered of her handwriting resulting from the testimony of a man, who swore he never saw her write, but had received many letters from her, and he believed the one offered to be in her handwriting.

7. Because the contents of the letter were not pertinent to the issue.

I. The affidavit, of the materiality of the testimony to be taken by commission, is required, in order to guard the party, against whom it is to be used, against the inconveniencies which may result from that mode of taking evidence; but when that party *consents* to the issuing of the commission, he waves the preliminary requisites introduced for his protection, 1805, 26, *sect.* 19.

II. There exists no law requiring that notice of the interrogatories to be put to the witnesses, should be served on the adverse party; nor even that these interrogatories should be filed within any particular time. The practice has been introduced by the attorneys, as a substitute for the notice of the time and place of taking the testimony. Perhaps the filing of interrogatories by the party, against whom the witness is to be examined, precludes him from requiring notice of the time and place, and when by consent the deposition is to be taken on interrogatories, notice of their being filed, affording the opportunity of having cross-interrogatories transmitted, dispenses with notice of time and place. But, in the present instance, the complaint is not that the

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notice of filing interrogatories was not given *at all*, or *too late* to afford the opportunity of sending cross-interrogatories, or of attending in proper time, but only that notice was not given *before* the commission issued. No complaint is made that the party had not notice of the time and place, and we must presume, as the contrary is not alleged, that such a notice was given.

III. The interrogatories being filed and notice given by an officer of the court, a sworn attorney, it is no objection that this was the first act of this person in the suit.

IV. Ceding debtors being entitled to the surplus of their estates, after the payment of their debts, the insolvent, John Clay, could not be used as a witness, by his syndics, till he had released his right to the surplus.

V. The fifth exception is taken in so general terms, that we cannot make it bear on any part of the record.

VI. The handwriting of the wife of the defendant was, in our opinion, sufficiently proven to authorise the plaintiffs to read the letter, if it could *at all* be admitted.

VII. The defendant, admitting impliedly, by

his objection to the proof of his wife's handwriting, that the letter, if true, was to be read to charge him; we consider the contents of it, being a request of supplies, as sufficiently pertinent.

We are of opinion that the fourth exception was a valid one, and that the judge erred in overruling it.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for a new trial, with direction to the judge not to admit the testimony of the ceding debtor, while the right to the surplus of the ceded property remains in him.

Hopkins for the plaintiff; *Bradford* for the defendant.

SMITH vs. *KEMPER*, *vol. III*, 639.

An absent person, in whose favour a stipulation is made, may avail himself of it.

A partner entering into a contract, in the name of the firm, cannot be admitted to say that he was not authorised to make it.

Livingston for the defendant. A rehearing has been granted to us, and we are to confine our argument to two questions.

1. Whether a person, after having created an interest for another, can destroy that interest, before the other has signified his refusal to accept it?

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2. How far a partner may bind his firm in contracts which, though not contemplated by the articles of copartnership, are entered into for the utility of the firm and for the better management of its business?

I. On the first question, in the terms in which it is stated, we may be permitted to remark, that the case can with difficulty be supposed to exist under any circumstances, and certainly cannot under those, in which this case is presented to the court.

In order to acquire a right in the property of another (except in the case of succession, forfeitures and cases in which the law alone operates) there must be a contract.

But a contract is the consent of *two* or *more* persons to form *between them* some engagement. 1 *Poth. Obl. n.* 3. The case supposed, in the first question, can at most only amount to a pollicitation, which is defined to be a promise which has not been accepted by him to whom it has been made, *Pollicitatio est solius offerentis promissum*: and according to Pothier, it "produces no obligation" and "he, who has made this promise, can retract, as long as it has not been accepted by him to whom it has been made." *Pothier on Obl. n.* 4. This doctrine is only

copied by Pothier from the Roman law, and is to be found in the *Dig. lib. 50. passim.*

The fifth law contains a case somewhat similar to the one under discussion. *Ex epistola quam muneris edendi gratia absens quis emisit, compelli eum ad editionem non posse.* And the Spanish law on this subject is declared by Rodriguez to be conformable to the Roman. The only cases, in which the pollicitation is declared to be binding, are when they are made to the community, and then only when they are in consideration of some dignity promised or conferred (in which case it would seem that it was no longer a pollicitation but a contract) and when they have caused some inconvenience or expence to the community by beginning to execute it.

The same principle is adopted in the English law, *vid. 2 Bl. Comm.* 30. And practising on this doctrine, their courts have determined that a bidder at an auction may retract his bid at any time before the article is struck off. 1 *Espinasse N. P.* 113, 47. 3 *Term R.* 148.

If we admit (and according to the authorities quoted I do not see how we can deny) that there is no contract before the offer or proposition is accepted, it seems to follow most conclusively that the party has a right to retract his offer, at any time before acceptance. If he has not, it

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must be because the party, to whom the offer is made, has acquired some right by this offer, but it has been shewn that such right can only be acquired by a contract, and that there is no contract without the assent of both parties, either express or implied, but the case supposes the assent of one party to be wanting, therefore there is no contract; therefore there is no vested interest; therefore the party had a right to retract.

The doubt expressed by the court seems to arise from conceiving that an interest can be created by contract, without an assent either expressed or implied of both parties, which it is respectfully supposed is a case that can never exist; however strongly expressed may be the offer, by whatever solemnities it may be clothed, it is but an offer, it is but a pollicitation, but a naked promise, which becomes binding only by the acceptance. The analogy is in nature. The female blossom of some plants is beautiful and has, to a cursory observer, every appearance of perfection; but alone it produces no fruit, the concurrence of the male stamen is necessary to give it force, vigour and stability.

The contract made between Duplantier and Kemper, if valid at all, was valid as a sale, it purports to convey a tract of land for a consi-

deration in money. If Smith acquired any interest by virtue of this transaction, it must be as vendee. Now let us examine whether any of the requisites to a sale can be discovered, as *applicable to him.* There must be a thing sold; a price agreed and the *consent* of the contracting parties. It would require no very subtle reasoning to shew that neither the thing nor the price can be said to *exist,* in relation to a party who is ignorant of both. But dropping those, we will take only the third requisite, the assent of the contracting parties, which Pothier says is "the very essence of the contract of sale, and consists in a *concurrence* of the *will* of the vendor to sell a certain thing, to the vendee at a certain price, and of that of the vendee to purchase the same thing at the same price." It will hardly be answered to this authority and to the inevitable deduction that must be drawn from it, that it only applies to the *contracting* parties, and that here Smith did not contract. I say this answer will hardly be given; because if Smith was not intended to be one of the parties to the contract, he can surely claim no interest under it: if he was intended to be one of the contracting parties, then his assent must be shewn, or the contract is void, and the other parties have a right to retract their offer as well

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in a contract of sale, as we have seen they have generally in other contracts. Pothier tells us that a sale may be made between persons who are absent, as well as those who are present, and that it may be made in the former case by *letters* or *messengers*. Let us consult this excellent civilian and see whether he does not throw some light on the case before us. "That the consent (he says) may be supposed to take place in this case, (a sale by letter) it is necessary that the will of the party, who has written to propose the sale, should be persevered in until his letter shall have reached the other, and that this other should *have declared that he accepted the bargain.*

This will shall be presumed to have been persevered in, *as long as the contrary does not appear.* But if I have written to a merchant in Leghorn to propose to him the purchase of merchandise at a certain price, and before my letter could reach him I write a second declining the bargain; or before that time I should die or lose my reason, in this case, although the Leghorn merchant, ignorant of my change of mind, of my death or insanity, should have answered that he accepted the bargain, yet no contract of sale shall be deemed to have taken place between us; because my will not having

been persevered in until the time that the merchant received my first letter and accepted my proposition, the *mutual consent or concurrence of two wills necessary to the contract of sale* was wanting."

Apply Pothier's supposed case to the one actually before the court. Duplantier and Kemper, we will suppose, both intended at the time of the private act, that Smith should have half of the land at the stipulated price, but, before Smith completed that act by his acceptance, they both change their minds and make a notarial sale conveying it to Kemper solely. Certainly if Pothier's reasoning (in which he is supported by the authorities he quotes) be correct, it puts an end to the question. The private act of sale given to Kemper was as much a nullity, as respected Smith, until his assent should intervene, as was the letter to the Leghorn merchant, until he answered it, and both had an equal right to retract until their assent were given. If we are not mistaken, this court have made a decision on this principle; even in the case of a notarial act, in the case of *Brognier Declouet* vs. *Blanque et al.* 3 *Martin*, 326. Several of the defendants had signed a notarial act, and before the acceptance of the plaintiff, or on his conditional acceptance, they erased their signatures, and

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they were held not to be bound, tho' the plaintiff afterwards agreed to accept, and actually signed unconditionally: this certainly could not have taken place, if an interest had vested in Declouet before his acceptance, by the signature of the defendants.

Again, if Smith had an *interest* before acceptance, he could not have had it gratuitously, he must have been under some corresponding obligation to pay the price, but it is absurd in terms to say, that he could contract an obligation without his assent to pay the price, therefore he could have no *interest* until he had by his assent contracted the obligation, and having no interest, Kemper and Duplantier, who were the only persons who had such interest, might dispose of it as they thought fit. It need hardly be remarked that the doctrine of implied *assent* cannot be at all applicable in this contract, which was an onerous one and made the purchasers liable to an action for the price.

I have in the beginning of the argument, stated successions and forfeitures, as exceptions to the rule, that no property can be acquired without assent, but the truth is they only exist as such by the common law. Ours is much more conformable to the dictates of reason, and does not, even in the case of the succession, give the pro-

perty of the deceased to his heirs, until they have expressed their consent to accept it. Confining myself to the simple question stated by the court, that alone has been the subject of discussion, and the case has been considered as if Smith had neither assented to, nor refused the bargain: but the evidence of his refusal is so extremely prominent, that I must suppose that the court directed the investigation in this form, more to throw light on the general principle, than to consider it as a question on which the determination of the court would depend: on this head I refer, first, to *Smith's letter*, 18*th August*, 1799, secondly, to

Duplantier's, *Baker's* & *William's* depositions.

II. We are to shew that no supposed motive of utility can enable one partner to bind the other beyond the *casus federis*, contained in the articles of copartnership.

Smith, in forming his partnership with Kemper, restricted it to the purchase of merchandise and the sale *for cash or convertible articles*; he never intended that, by this contract of copartnership his partner should be authorised, even where he thought it advantageous, to the concern, to deal in *lands*. Certainly the purchase

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of land is as much excluded from the terms of this contract, as the *sale* of them would be; if the one is to be effected for the benefit of the trade, the other is equally so: yet it will scarcely be supposed that if Kemper saw the means of making a great commercial speculation, he would have a right to sell Smith's landed property, in order to raise money to effect it. The object, therefore, to be attained by the act can never bring it within the contract, if it were not within the contemplation of the parties, at the time they formed the contract.

Whatever is clearly expressed in an instrument is said to be *according to its letter*. Whatever is not so clearly expressed, but which may fairly be presumed from the tenor of the whole to have been the *intent* of the parties, is said to be *within its spirit*. Whatever is not contained within the letter or the spirit of a contract, does not come within, and cannot be justified under, it.

In a copartnership for buying and selling merchandise, the right to purchase and sell the common stock is, according to the letter of the contract, and the right to hire a shop for the purpose of exposing the goods to sale, though not expressed, is within its spirit. Is it the same thing with respect to the *purchase* of a store? I think not: because it cannot fairly be presumed to have

been the intent of the parties, or to have been in their contemplation, at the time of making the contract: as real estate has been deemed more important than personal, most, perhaps all, codes of laws have prescribed greater solemnities for its conveyance; and in an instrument relating both to real and personal estate, the former would always be considered as the principal, the latter as the subordinate object; it is fair, therefore, to conclude, that if the parties had, in establishing a commercial house, contemplated a purchase of real estate, for the more convenient transaction of their business, that this important point would have been expressed. The numerous and obvious inconveniencies of suffering one partner to bind the other by contracts as to real estates, need not be dwelt upon, when we have this conclusive argument to use, that no contract for the purchase of land is valid unless made in writing by the party, or his attorney lawfully appointed. Now, as Smith did not make the contract himself, a power of attorney must be shewn in writing from him to Kemper, or Kemper's act cannot bind him, and of course can give him no interest. It must therefore, I think, be concluded that the power to purchase, even a *store* for the sale of the merchandise, is neither within the letter nor the spirit of the articles, and

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therefore cannot be justified by any motive of supposed utility.

But, when we reflect that the purchase in question was a large tract of land, more than a thousand times greater in extent than was necessary for the purpose of building a store, that it was made evidently for the purpose of speculation, and a speculation totally foreign to the object of their partnership; and that Smith himself has declared on record in his petition to the Spanish commandant that Kemper "*had no authority to purchase,*" there seems to be little doubt, reasoning on general principles, that, in this case, the purchase must be solely for Kemper's account; the doctrine, thus laid down in this argument, appears to be supported by the following authorities:

Dig. 17, 2, 82, Godfrey's note (no. 32.) *Extra societatem gesta, socios vel consortes non obligant sed ipsos tantum contrahentes.*

7 *Durnford & East,* 207.

1 *Dallas* 122, president Shippen sets aside a bond and confession of judgment executed by one partner for both, in the following terms: "There can be no doubt that in the course of trade, the act of one partner is the act of both. There is a virtual authority to that purpose, mutually given by entering into partnership; and

in every thing that relates to their *usual dealings*, each must be considered as the attorney of the other. But this principle *cannot be extended further, to embrace objects out of the course of trade.* It does not authorise one to execute a deed for the other: this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication."

So in a similar case in New-York, 2 *Caines* 255, Judge Livingston says, "It is settled in England that one partner, in consequence of the general authorities derived from the articles of copartnership, cannot execute deeds for the other. Were it otherwise, they would be enabled to dispose of the real property of each other, and to create liens on it without end; this would render such connections more dangerous than they already are, if not discourage them altogether."

In 1 *Day's Rep.* this doctrine was extended to a policy of insurance by one partner in the name of both. A case certainly more analagous to mercantile transactions than the purchase of land.

Moreau for the plaintiff. The defendant's counsel contends that in order to acquire a right

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in the property of another (except in the case of succession or forfeiture, and cases in which the law alone operates) there must be a contract, which cannot be formed without the assent of all the parties, otherwise there is no contract, but a promise or a pollicitation, which produces no effect: and therefore till the plaintiff gave his assent to the purchase made in his name by the defendant, the sale was revocable, at the will of the latter or of the vendor.

The proposition is not perfectly correct. Property may be acquired not only by succession or contract, but also by the obligations resulting from the acts of a man, without any contract, as quasi contracts, torts and quasi torts, accession, occupation, prescription, judgment, &c. *Code Civil* 145.

It is true that a contract, or to speak more correctly, a convention, according to Pothier's definition is the consent, of two or more persons to create an argument. *Pothier on Obl. n.* 4. Consequently in sygnallamatic contracts, the consent of all the parties is required for the perfection of the contract. But it is otherwise in quasi contracts, especially in that of *negotiorum gestorum*, which are formed by the sole act of the *negotiorum gestor*, without the assent, or even the knowledge, of him whose affairs are

managed, *Civil Code* 319, *art.* 5. We are then closely to examine the various engagements resulting from the act of sale, entered into by Duplantier and the defendant, in the name of the partnership of Kemper & Co. We find in this act a contract, and a quasi contract. A contract of sale between Duplantier and Kemper & Co. and a quasi contract between the plaintiff and the defendant, considering the act as not binding on the firm.

This act contains a contract of sale between Duplantier and Kemper & Co. For the defendant purchases a tract of land in the name of the firm, for a price agreed upon. The act is evidence of the reciprocal assent of the parties, which is required in all sygnallamatic obligations. Duplantier agrees to sell to Kemper & Co. and the defendant under the signature of the partnership, agrees to pay the price agreed upon. The contract is then perfect between Duplantier and the defendant, and it was no longer in the power of Duplantier to destroy its effect, without a formal retrocession of the defendant, contracting in the same capacity; this did not take place. This act cannot then be considered as a mere pollicitation, a promise not yet accepted by the promisee, who is at liberty to reject it. There has been a sale by the ven-

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dor, accepted by the vendee. But the acceptance is said to be without effect, because the defendant could not bind the plaintiff, his partner, by a contract for the acquisition of land, under their articles of partnership. The insufficiency of the defendant's powers, may be opposed by the plaintiff, and not by the defendant. It often happens that an attorney exceeds his powers in purchasing, in the name of his constituent, a thing which he was not authorised to purchase; but it does not follow from hence that there is no sale, no reciprocal consent: if the constituent does not ratify the purchase, it will remain for the account of the attorney—but till the constituent manifest his intention, the right to accept the purchase is in him and cannot be affected, even by the concurrence of the wills of those who made the contract.

The act of sale between Duplantier and the defendant, supposing the latter not to have had sufficient powers to bind the partnership, contains a quasi contract of *negotiorum gestorum* between the plaintiff and the defendant, which precluded the latter from destroying, in his private name, the engagement which he had taken in the plaintiff's name, till he formally refused to ratify it.

When any attorney, says Pothier, has exceeded his powers, his conduct, in regard to

what is beyond those powers, forms between us a quasi contract of *negotiorum gestorum*. 2 *Contrats de bienfaisance, n.* 177.

Can the attorney, who has contracted, in the name of his constituent, for some thing beyond his powers, rescind by his own act the contract, before the constituent had time to ratify it? We think not.

Pothier informs us that this question was strongly debated in France, in regard to stipulations in a contract, in favour of third persons, not parties thereto, and remained undecided till the ordinance of substitutions.

According to the strict principles of law, adopted in France, one could not stipulate or enter into an engagement, in one's own name, but for one's self, and consequently when one stipulated a thing with another, for a third person, the convention was void. 1 *Pothier, Ob.* 54, 55. But what concerned a third party might be the mode or condition of a convention, altho' it could not be the object of it. So altho' nothing could be directly stipulated for a third person, the vendor might bind the vendee to do something for a third person. *id.* 71.

On this the following question arises: whether, having given you a thing, on condition that you should return it to a third person within a

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given time, or to give him something else, I might release you from your obligation, the third person not being a party to our bargain? Pothier says, the writers were divided on it, and does not disclose his own opinion. From the adoption of an affirmative answer, there would result no general rule, but a particular one only, confined to the case of a donation or liberality towards the third person, not a party to the contract. When I give you a thing, charging you to deliver another to a third person, two distinct donations occur: the one to you, which derives its perfection from your intervention and acceptance, the other in favour of the third party, which can only become perfect by his acceptance. Till he accept, his right is in suspense, and I may revoke what I have done in his favor, because the donor may revoke the donation while it remains unaccepted. *Pothier, Don. inter vivos, sec.* 2. *p.* 54.

These authorities, however, are not applicable to the present case. The defendant did not stipulate in his own name, but in that of the plaintiff, or of the firm of Kemper & Co. Supposing that his powers, as a partner, were not sufficiently extensive to bind the partnership, for the purchase of a tract of land, he was in the situation of an attorney, having done, in

the name of his constituent, an affair which exceeded his powers, or of a person who had taken on himself to purchase a thing for another, without his authority or knowledge. In either case the purchase would not be null, but subject to the ratification of the person for whom it was made. If the *negotiorum gestor* occasions any loss to him whose affairs he undertook to manage, in purchasing things, which the latter did not usually purchase, the loss will be his own; and we say, that on the contrary, if any profit result therefrom, it shall be for him whose affairs have been managed. *Part.* 5, 12, 33.

It is clear from this law, that he, whose affairs have been managed without his knowledge, acquires a right on the sale which has been made in his name, if it appears to him beneficial. How can this law be reconciled with the opinion of those who hold that a *negotiorum gestor* may annul a contract, which he has made, before it be ratified by him, on whose account it has been made. When I have purchased, in the name of a third person, without his authority or knowledge, the law raises between him and me a quasi contract of *negotiorum gestorum*, which binds me, in the same manner as if I had purchased with his authority. *Code Civil* 319, *art.* 5.

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If it cannot reasonably be pretended, that an attorney, who contracts in the name of his constituent and according to his power, cannot annul the contract without the assent of his constituent; how can the *negotiorum gestor*, who in this case is assimilated to the attorney, possess a right, which the latter has not?

In the case of a donation in favour of a third person, the donor may revoke the donation till it be accepted, for till then no right is acquired to the donee; but the case is a very different one. Duplantier did not sell to the defendant, but to Kemper & Co. or to the plaintiff and defendant. The property therefore passed to them, altho' the transmission of it might depend on the ratification of the plaintiff. Every day purchases are made for third persons subject to their ratification. Till then the purchase is conditional, but the right is no less acquired to the third person, to avail himself of the purchase.

The attorney who, in a contract, has overleaped the limits of his authority, cannot annul the contract without the consent of his constituent; nor the *negotiorum gestor*, without that of him, in whose affairs he has interfered. We have already seen that the act of the attorney, who had exceeded his powers, was assimilated to the quasi contract of *negotiorum gestorum*.

The constituent has the same right as he, whose affairs have been administered. He may take or refuse the bargain.

It is only in cases, says Pothier, in which the attorney confines himself within the limits of his powers, that the constituent may be supposed to contract thro' the intervention of his attorney, with those with whom the latter contracts, and that he becomes bound to them. If the attorney exceeds his powers, the constituent may disapprove the contracts he has made in his name and leave them for his account. 2 *Contrats de bienfaisance.*

The constituent has then, in such a case, the right of approving or disapproving the contract. This right results from its being made in his name, although without his authority. Who can then take from him a right which the law gives him? How then can it be said the attorney can? This cannot be answered in the affirmative without the support of a positive text of law—one will be looked for in vain. Pothier says, that the refusal of the constituent does not annul the contract, but that it remains for the account of the attorney.

The *Partida* 5, 5, 48, declares formally that when one has purchased a thing, in the name of a third person, the latter may take the bargain

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for himself, and the purchaser is bound to deliver him the thing and its fruits.

Gregorio Lopez, in his commentary upon this law, says that the right of the third person is grounded on the quasi contract of *negotiorum gestorum*. This author is relied upon to shew that until he ratifies the contract, it may be annulled by the person who made it. He says that when a *negotiorum gestor* purchases as such, the contract ought to be made in these words, "you sell to me such a thing for A. B. whose *negotiorum gestor* I am." That in such a case the sale is perfect, because that reciprocal consent which the contract of sale requires exists: but that if the sale is in these words, "you sell such a thing to A. B. who is absent, and whose attorney I am," then as the attorneyship does not exist, there is no consent, but that of the vendor; and the sale can only become perfect by the ratification of the vendee, if the vendor persist in the determination. Hence he concludes that he may till then revoke the sale, the consent of the parties in a sale being necessarily reciprocal, and simultaneous. But, he adds that, if the vendor has dealt as attorney of the absent party, whatever expressions may have been used, the vendor cannot revoke the sale.

Here it is to be noted that the sale has not

been made to Smith, an absent person, but to Kemper and Smith. It is true the defendant acted in the name of the firm: but it is admitted, that he was a partner. The contract was then perfect between the vendor and vendees, Duplantier and Kemper & Co: partners being supposed to have given each to the other reciprocally the power of administering their common affairs. *Code Civil*, 395, *art.* 37. A partner has *primâ facie*, especially with regard to third persons, the right of representing his co-partners. Among themselves they may inquire whether one of them has exceeded his powers, and refuse to ratify contracts which are foreign to their concerns, and who could not appear such to the persons with whom he dealt. The observations of Gregorio Lopez have no relation to the present case. The defendant did not take a bill of sale for the account of the plaintiff, calling himself his *negotiorum gestor*; neither to the plaintiff, calling himself his attorney. He purchased as a partner, for the account of the firm. If he acted within his powers, the bargain is binding on the firm; if he did not, the contract is not the less valid between the parties. Duplantier ought not to suffer from his confidence in the defendant, having made with him a contract, not evidently foreign to the

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affairs of the firm. If he exceeded his powers, it only follows that his copartner, the plaintiff, may accept or reject the bargain. In the latter case, it remains in full force for the account of the defendant.

But it is contended that the purchase, tho' made by the defendant for Kemper & Co. is for his sole account. *ff.* 18, 1. 64.

The law relied on is as follows: I purchase land for myself and Titius. Is the sale valid for the whole, or only for one half, or absolutely void? I answer, it is vain that Titius' name is mentioned; consequently the land is wholly acquired to the purchaser, who contracted.

The civil law did not admit any one to stipulate, or undertake any thing, except for himself, 1 *Pothier, Obl. n.* 53. One could not, therefore, stipulate for a third person, unless he acted in his name, and had power so to do, as attorney, partner or otherwise, and it was necessary to make an express mention of this. 1 *Pothier, Obl. n.* 54, 84. It is on this incapacity of stipulating for a third person that is grounded the law relied on. This is evident from Rodriguez's notes on this part of the digest.

Altho', when one stipulates a sum of money, as well for himself as for a stranger, the stipulation is valid for what he stipulates for himself,

it is said in the above law, that the person of Titius is vainly named, and that the sale is valid for the whole: and the reason of it is that the sale is indivisible, and cannot be valid for part and invalid for the rest. 6 *Rod. Dig.* 387.

L'Esparat says, 'If I purchase for myself and a third party, without authority from him, the sale is void as to him, and the whole belongs to me:' *l.* 64, above cited. Yet, as is observed by Pothier on this law,—*hoc non obtinet in omnibus conventionibus: in stipulationibus, cum stricti juris sint, si quis sibi et extraneo stipulet, stipulatio in partem dumtaxat valet, ut definit Pomponius in lege* 110, *de verb. ob.* 2 *Dict. du Dig.* 554, *n.* 68.

This is also what is supposed in the *Napoleon code, art.* 1119—1121. Where it is said, that one can only take an engagement or stipulate, in one's own name—except for one's self.

The maxim then that one cannot stipulate for a third person was the basis of the decision in the law cited, according to which, the purchase, which I had made for Titius and myself was invalid as to him.

In the present case, the stipulation was a different one. The defendant did not purchase from Duplantier for the plaintiff and himself; the only case in which the law cited might be ap-

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plicable to the purchase. As a partner he bought for the firm of Kemper & Co. of which he was a member. He did not then stipulate for himself and a third party, having a distinct interest, and without any authority from him: but for the firm, in an affair, which he believed he had a right to conclude as a partner.

Farther the rigor of the Roman law, in this respect, admitted in France with a restriction, viz: 'That one cannot *generally* stipulate in one's own name for a third person,' is further relaxed by a formal law of the Partidas. The law 48, already cited, declares, *that if one purchases, in the name of another, the latter may ratify the contract and avail himself of it.* With such a formal text, in opposition to it, how can the principles of the Roman law be invoked, even in cases to which they would otherwise be applicable? How could one, able to avail himself of a bargain, absolutely made in his name and without his authority, be repelled if he were interested in the bargain for a part only?

We see daily the same thing bought by several persons, and when Pothier speaks of the right of him, for whom a contract was made without his authority, to ratify and avail himself of it, he makes no distinction on the different kinds of contracts, nor on the nature or quantity of the interest which he may have therein.

If I contract in the name of one, who has not authorised me, his ratification will cause him to be deemed to have contracted by my intervention: for the ratification is equivalent to a power. 1 *Pothier, Obl. n.* 75.

He in whose name a tract of land or part of it has been purchased, has the right of being considered by the vendor, in the same light as if he had purchased by an attorney. How can this right be reconciled with a faculty in the vendor to annul the sale, and in him who made the purchase to destroy the effect of the bargain, without the concurrence, and against the will of the person for whose account it was made?

But, a ratification is spoken of! Does any exist? Can a sale, with delivery of possession, be destroyed by a second sale, made by the vendor to a third person? The property in the land having once been transferred by Duplantier to Kemper & Co. the effect of this transfer could only be destroyed by a retrocession from Kemper & Co. to Duplantier, who might afterwards sell to the defendant alone, or to any other person. Nothing of the kind has taken place. Duplantier has made a second sale to the defendant, without destroying the first. A second sale may prevail over the first, made by the same vendor, when the first was not attended with a delivery,

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and the second is. But here the record shews that the firm were put in possession, since in January and December 1800, the defendant paid out of their funds, and as a charge to which they were liable to, the costs of the survey, as well as those of the improvements he made on the land. Besides it would be necessary to examine whether the second sale to Kemper & Co. be not a repetition or confirmation, rather than a revocation of the first. Although the act was under the private signatures of the parties, it was perfect, since real estate may as validly be sold in this manner, as by an authentic instrument, and the clause by which the parties agree to have an authentic deed of sale executed of the land which has been sold by a private deed, adds nothing to the validity of the sale, and has no object but to give it authenticity.

II. The second question proposed by the court is the only one which appears to demand their attention. For, if we prove beyond any doubt, that the sale by Duplantier to the defendant, in the name of Kemper & Co. was strictly binding on the firm, all other questions will become unimportant. If the defendant had the right of purchasing land for the firm, the sale made by Duplantier to the firm is perfect, hav-

ing had the assent of the vendor and vendee. It could consequently be avoided only by a retrocession, which did not take place.

It is a clear principle, in regard to all partnerships, and commercial ones are not excepted from it, that a partner binds his copartners, in all affairs which are not foreign to the partnership.

Partnership is contracted for every thing that may relate thereto. Therefore, if one of the partners contract a debt, private to himself and absolutely foreign to the partnership, it is not to be paid out of the partnership funds. 6 *Rod. Dig.* 337.

The signature of the firm does not bind the copartners, when it appears, from the nature of the contract, it does not relate to its affairs, as if I were to put the signature of the firm to the lease of a tract of land, my private property, which I had not put in the common stock. 1 *Pothier Obl.* 83.

If from the nature of the contract which I make with a copartner, the object of it appears not to concern the partnership, as improvements to his houses making no part of the partnership property, the signature of the firm apposed to the contract will not render it a partnership contract, while the object of it shews that it is not. *Pothier, notes a la suite du contrat de louage.*

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It is then less by any particular clause, in the articles of partnership, than by the nature of the contract, and its connexion with the affairs of the partnership, that we are to judge, (at least in regard to third persons) whether a partner could bind the firm, in his contracts for the partnership. For otherwise the interests of those who deal with a partner, under the signature of the firm, would often be in jeopardy. Partnership articles are generally kept secret: the production of them is seldom required; it would often be impossible: many partnership contracts being merely oral. It is then just that contracts made by a partner be regulated less by conventions known only to the copartners, than by the nature of the affair and its connexion with the interest of the partnership.

Is it then unusual for partners to purchase a dwelling-house, or ware-house for the use of the firm? Is it necessarily compelled to rent? Would the purchase in such a case be held foreign to the affairs of the partnership, and will it be required for its perfection that every individual of the firm should intervene? Surely not. The signature of the firm, apposed by one of the partners, binds all the partners.—provided the contract be not evidently foreign to the affairs of the partnership.

When Duplantier contracted with the defendant, he clearly saw that the purchase was not foreign to the affairs of Kemper & Co. who were exchanging goods for cotton in the seed, and to whom, consequently, a tract of land was useful for the erection of a gin and ware-houses. It was unimportant for him to know whether the articles of partnership between the plaintiff and defendant, to which he had no access, contained any special clause in this respect. He received the signature of the firm, and it sufficed to him that the contract was not foreign to its affairs, in order to create the expectation that both parties should be bound thereby.

This being established, can it be contended with any hope of success, that tho' the plaintiff was bound by the signature of the firm to pay the price agreed upon, and though he actually paid it, the defendant may now claim the premises as his individual property, under the pretence that the partnership articles did not authorise him to purchase them. It would be the first time that a mandatory would plead that he had exceeded his powers.

It is to be remarked, that the partnership articles declare that, 'It's affairs shall consist in the sale and exchange of merchandise', but it does not interdict other affairs to the partners.

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DERBIGNY, J. delivered the opinion of the court. * I. In the discussion of the first question, the counsel for the plaintiff and appellee have appealed to principles of incontrovertible truth and soundness, but the application of which to the present case is by no means obvious, *viz.* that no offer or proposition, tending to a contract, can be binding on the person proposing, until the proposition be accepted; because there can exist no contract, without the concurrence and simultaneous will of the contracting parties.

To apply this principle to the present case, the counsel for the appellee have been reasoning throughout, as if Duplantier, the seller, on one side, and the appellants on the other were parties to this suit. The case of a merchant, proposing to another by letter to sell him merchandise, at a certain price, and withdrawing his proposition before acceptance, is quoted and relied on, as one which bears a strong resemblance to this. Duplantier must then be the person proposing, and Smith the person to whom the proposition is made. But does that agree with the fact? Is there in this case any feature which warrants the comparison? Surely not. And what are the facts here? Duplantier, the

* MARTIN, J. did not join in this opinion, having been of counsel in the cause.

proprietor of the land now in contest between the parties to this suit, made an absolute sale of that land to the partnership of Kemper & Smith. The contract was perfect and complete. The right of Duplantier on the land was conveyed away, never to return, unless by consent of the purchasers, say of Kemper at least, and through a regular reconveyance of the property. Duplantier then could not retract, and his subsequent attempt to sell again a property, which he had already transferred and delivered, is a nullity, unless, as we have heretofore said, it is taken as a confirmation of the first sale.

The question may, therefore, be reduced to this. Can the purchaser, who has bought for himself and an absent person, take the whole bargain for himself, before the absent person has refused to accept?

The strongest authority which can be found in favor of the affirmative, is the *Digest*, 18, 1, 64. *Fundus ille est mihi et Titio emptus. Quæro utrum in partem aut in totum venditio consistat, an nihil actum sit? Respondi, personam Titii supervacuo accipiendam (puto) ideoque totius fundi emptionem ad me pertinere.*

By the Roman law, no body could stipulate for a third person, without authorisation. *Inst.* 3, 20, *l. si quis.* Therefore, when a stipulation

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had been made by one for himself and another, if the stipulation was for a thing divisible, as a sum of money, the contract was valid for one half in favor of the party stipulating, and null as to the other moiety. In the case here presented, it is asked what will be the effect of the sale of an immoveable, thus made in favor of two persons, one of whom only stipulates, and it is decided, that the whole estate is acquired to the party stipulating, because, says Rodriguez, in his note upon that law, *the sale is indivisible, and cannot be valid for a part only, as is a stipulation for a sum of money.*

The question settled by this law is not therefore that which arises here; the right of Titius to accept or refuse is not the subject. The validity of the sale is made the question—is it valid in whole or in part, or is it a nullity? Perhaps, this question arose upon a pretension manifested by the vendor to take the property back.

But what will be the use of that law? It is not law in this country; the Spanish code in matters of stipulation in favor of third persons differs altogether from the Roman. By the precise disposition of the Partida 5, 5, 48, any person may buy for another, and the person, in whose favor the purchase is made, may avail himself of it, if he pleases.

Subsequent times have gone farther yet. By the *law 3, tit. 8, book 3, del ordinamiento,* the *recopilacion 5, 16, 2,* even pollicitations are made obligatory. *Hodie tamen, de jure regio bene quæritur actio illi tertio, et sic corrigitur in hoc jus commune: ita disponit l. 3, tit. 8, lib. ordinament. imo quod magis est nedum precedit, quando quis stipuletur illi tertio absenti, sed etiam quando simpliciter et nudâ pollicitatione quis promittit absenti, ita aperte disponit prædicta lex. Ex qua bene nota quod hodie in nostro regno ex nuda pollicitatione oritur actio et corrigitur totus titulus de pollicitationibus.* 2 *Gomez,* 700. On which article the following comment is to be found in the additions to the same chapter: *de jure regio quemlibet alteri stipulari posse, et ex hujus modi, stipulationem directam actionem illi tertio acquiri, ut resolvit Gomez, docent Covarubias, Guthierez, Matienzo, Acevedo, Ceballos et alii communiter, no. 3 on the 7th law. tit. 11, part 5.* The general opinion of the Spanish jurists predicated upon the law 2, *tit.* 16, *book* 5, *of the Recopilacion de Castilla,* seems therefore to be conformable to that of Gomez: some of them going even so far as to say that, if the stipulation in favor of the absent has been made in a public instrument, it gives the right of an executory action, *jus exequendi.*—Sanchez alone is of the

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opinion that such a stipulation is of no effect before the acceptance of the absent, but even that opinion does not raise a doubt as to the validity of the stipulation; it only contends that the effect of it is not to take place before the acceptance. But, independently of any comment and of any disquisition, what can be more explicit than the law itself? *Obligado uno a otro por promision o contrato, u de otro modo, debe cumplir y no puede exceptionar ni que se hizo entre ausenti, ni que no hubo tal estipulacion, ni que no fue ante escribano publico, ni que la obligacion fue hecha a otra persona privada, en nombre de otros ausentes, pues que, constando que se obligo, la ha de cumplir.*

So much for the stipulations made in favor of a third person, unconnected with any right acquired by a contracting party present. But the subject immediately under our consideration, to wit, a stipulation made in favor of two persons, one of whom only is present, at the time of making the contract, is itself particularly mentioned by the same author, in the following article, in a manner that removes all doubts as to the validity of such stipulation in favor of both. *Dubium tantum est si quis stipuletur copulative sibi et tertio extraneo decem, an ista stipulatio et promissio valeat, de jure communi et jure regio, et in quo valeat? et*

breviter dico quod talis stipulatio et promissio intelligitur tantum facta in persona utriusque in solis decem, unde de jure communi valet in personâ stipulatoris, pro medietate, et sic quinque; in persona vero tertii extranei erit inutilis; respectu alterius medietatis sibi contingentis in aliis quinque, &c. Hodie tamen de jure regio valeret talis promissio in utriusque persona, per dict. leg. ord. quilibet poterit agere pro medietate, and in the additions to that number, *stipulantem copulative, sibi et extraneo, sibi tantum acquirere pro medietate, in alia vero inutilis eam esse stipulationem de jure communi, secus vero de jure regio, ut hic resolvitur comprobari facile potest, ex addictis numero precedenti.*

A right is there given by the Spanish law to the absent person in whose favor a stipulation is made, whether that stipulation be for his only benefit or for the joint interest of him and another person, present at the time of stipulating. In the first case some authors are of opinion that the stipulation is of no effect, until it is accepted, tho' the general doctrine be that such acceptance is not necessary. But, in the other case, that in which the obligor has entered into a contract with one of the obligees, no question is made as to the validity of the contract in favor of both, and the necessity of an acceptance, on the part of the ab-

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sent person, for the purpose of giving the contract effect against the obligor is not even thought of.

As to the consequence of a refusal on the part of the absent person, with regard to the party who has undertaken to contract in the name of both, it is not a question to be examined in this case, because, for the reasons adduced in our first opinion, we do not think that any refusal has taken place on the part of the appellant.

Hitherto we have considered the appellee as a person entirely unconnected with the appellant, and having undertaken without any authorisation to make a purchase on the account of both. We have seen that, even if such was their relative situation, the contract entered into by the appellee would be valid, and would give to the appellant a right to one moiety of the property bought: but, when we consider that the parties were partners in trade, at the time this contract was entered into, not only the above principles apply to the case with additional force, but others come to their aid, which put the claim of the appellant in a still more favorable light.

Partners in trade for the purpose of transacting the business of their concern, are tacitly vested with the necessary power to bind the partnership, in all such contracts as are within the sphere of its commerce. Within these limits each partner is

considered as the attorney of the others, and whatever he does is obligatory on them. If he transgresses those boundaries, he places himself in the situation of an attorney, who exceeds his powers. But, are the acts of the attorney in such cases void *ab initio?* No: they may be made valid by the approbation of the constituent. The attorney, says our code, cannot go beyond the limits of his power; whatever he does in exceeding that power is null and void, with regard to the principal, *unless ratified by the latter. Code civil* 424, *art.* 24. That doctrine is the same which existed before. *Curia Phillipica, lib.* 1, *cap.* 4, *n.* 20. The appellant then has a right to ratify and accept the purchase of the land, which is the subject of this action, and the appellee cannot pretend that because he exceeded his powers in making it, the property belongs to him alone.

But, can the appellee be permitted to say that he exceeded his powers? Can he object to the validity of his own acts? Powers of attorney may be given by instruments under private signature, and even by letters. They are the title of the attorney against his constituent to prove, should it be denied, that he acted with due authority, and to make the constituent responsible for what he has done by his order. But the consti-

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tuent retains no voucher of his authorisation. If it should be permitted to the attorney, after having contracted in the name of his principal, to say, that he was not authorised, he might, should the bargain turn out an advantageous one, apply it to his own benefit. To that effect, it would be sufficient to conceal or destroy the evidence of his authorisation. So between partners (and be it understood, that we have seen nothing in this case that would justify any allusion to the parties). Independently of the powers derived under the articles of partnership, authorisation may be given by one to the other by letter or otherwise: and if the partner, thus authorised, should wish to enjoy alone the benefit of any advantageous transaction, made under such authorisation, nothing would be more easy for him than to secure it. Those reflections are made with the only view to shew how just is the rule which does not admit a party to contradict his own deed, a rule which applies here with particular force: for the act of the party imports the confession of a fact, the proof of which may be in his power alone. We are of opinion that the appellee, after having stipulated in his contract, in the name of the partnership, cannot be admitted to say that he was not authorised to that effect.

For those reasons, in addition to those already expressed in our first opinion, we should think that the judgment rendered in this case ought not to be disturbed: but, as it further appears to us, that, at the commencement of the suit before the Spanish governor of Baton-rouge, as mentioned in the proceedings in this case, the premises were in the hands of the appellee, as part of the partnership stock, and the proceedings in the said suit before the Spanish governor, whereby the appellee was dispossessed, appear irregular and illegal; it is ordered, adjudged and decreed, as the judge of the fourth district ought to have decreed, that the appellee be restored to the possession of the said tract of land, as described, and set forth in the proceedings in this case, to be held by him as part of the joint stock of the late partnership between him and the appellant, John Smith, until the final settlement and payment of the accounts of said partnership. And that a mandate do issue from this court to the court of the fourth district for the parish of Pointe Coupee desiring the said court forthwith to issue the proper writ to put the appellee in possession of the said tract of land accordingly.

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DUSSUAU'S SYNDICS vs. BREDEAUX.

When the homologation of the proceedings of a meeting of the creditors of a bankrupt has passed *in rem judicatam* they cannot be objected to, on the ground that they are recorded in the French language.

DUSSUAU'S SYNDICS vs. *BREDEAUX.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellees, as syndics of L. Dussuau, a free man of color, claim as part of the estate surrendered, a female slave, whom they alledge is unjustly and without right detained by the defendant.

It is in proof that she was the property of their insolvent, at his surrender, but the defendant alleges on the one hand that the plaintiffs have no right to sue, because they are not the syndics of the creditors: their appointment as such appearing by proceedings, which are recorded in the French language and consequently null. On the other hand, he avers that he bought this slave at public auction, and has a legal title thereto. In support of this allegation he produces in evidence, the record of a former suit brought against him by the appellees, in which they set forth that he purchased from them, at public auction, in their capacity of syndics of Dussuau's creditors, the slave now in dispute, for the sum of $885, payable in March 1815, for which he was to give his note of hand, endorsed to the satisfaction of

the vendors; but that he took and retained possession of the slave without having complied with the conditions of the adjudication. His answer to this claim was a special disavowal that any such purchase had been made by him, and he appears to have obtained thereon a dismissal of the suit.

Being now called upon to surrender the slave he turns round and alleges that he is owner of her by virtue of a sale, made to him by the plaintiffs in their capacity of syndics, but being aware that such a claim would be disregarded, he previously pleads to the persons of the plaintiffs, alleging that they are not duly qualified to act as syndics of the creditors of the insolvent, because their appointment as such is recorded in the French language.

We incline, indeed to think that the acts of creditors convened by a court of justice are part of the judicial proceedings, the whole course of which forms what is known to the Spanish laws by the name of *Juicio de Concurso*, and as our constitution directs that all judicial proceedings should be recorded and conducted in English, we are disposed to believe that if the objection raised had come from a person who had no concern in, nor adhered to, the proceedings complained of, it would be our duty to declare they

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are not legal. But we do not find it necessary to decide the question absolutely in the present case. These proceedings, regular or not, have been approved by the judge, and are binding at least upon those who were parties to them and did not oppose their homologation, nor appeal from the decree pronouncing it. The defendant is a creditor of Louis Dussuau, as appears from his answer to the first demand brought against him by the plaintiffs. Nothing shews whether or not he was personally called to the meeting of the creditors, but he certainly had notice, through the publication made thro' the newspapers, and considering that he lived out of the jurisdiction of the court, before whom the proceedings of bankruptcy were pending, that ought to be deemed sufficient. *Febrero de Juicios, lib. 3, ch. 3, sect. 1, no. 15 at the end.* Besides his own conduct shows his acquiesence in the proceedings of the creditors. For in his answer to the first suit, far from contesting the plaintiff's right to sue, he pleads to the merits, and claims from them, in their capacity, the sum due him by the estate of the insolvent. The homologation of this nomination ought certainly to be considered as *res judicata* between him and the plaintiffs.

As to the nature of the title of the appellant, it consists in an adjudication to him made of the

slave in dispute by the judge of the parish of St. John the Baptist, acting as auctioneer. By the process verbal of that adjudication, which the defendant has offered in evidence and which we think ought to have been received, it appears that he did not sign that adjudication, and it further appears that it was a condition of the adjudication, that the purchasers should give their notes of hand, duly endorsed, and execute deeds of mortgage of the property sold; none of which requisites appear to have been complied with by the defendant.

The adjudication then standing alone, being the act of only one of the parties, no contract of sale can be said to have been completed between them. Hence the defendant being called upon to pay the price of this adjudication, denied having made the purchase, and succeeded in having the suit dismissed. His present attempt to keep possession of the slave, by virtue of the same title, which he then disclaimed cannot avail him.

It is ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Paillette for the plaintiffs, *Hennen* for the defendant.

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LECARPENTIER vs. DELERY'S EX'R.

LECARPENTIER vs. DELERY'S EX'R.

A person appointed, as an expert, to verify a signature, must decide on comparison of handwriting, & cannot receive and act upon information of the circumstances of the case.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. This is an action brought against the endorser of a promissory note duly protested. The defendant having died since the beginning of the suit, the answer is filed by his executor, who refuses to recognise the signature of the endorser as that of his testator. Upon this refusal two skilful persons were appointed by the court (conformably to the civil code 306, *art.* 226) to compare that signature with others acknowledged to have been written by the testator and report thereon. They disagreed, and by consent of the parties, a third person was named to settle the difference; but that person not being able to ascertain by the mere comparison of handwriting whether or not the endorsement was in the handwriting of the testator, went about collecting other information on the circumstances of the case, and reported that being satisfied from that enquiry that the testator had really given the endorsement, he was convinced that the signature in dispute was really his.

To the admission of such a report the defendant objected, but his opposition being overruled he excepted to the opinion of the parish court and on the bill of exception he took we are now called upon to pronounce.

Nothing can be clearer than this point. The persons appointed to judge of a signature by a *comparison* from handwriting, is not a referee, to whom the examination of the case is entrusted. His task is confined by express law to the comparison, if he can judge thereby, he must report accordingly; if he cannot, he must declare it: any other inquiry for the purpose of aiding his judgment is evidently illegal and the report upon it inadmissible.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cause be remanded with directions to the judge to try it anew and not to admit the report excepted to: and it is further ordered that the costs of this appeal be borne by the appellee.

Paillette for the plaintiff, *Denis* for the defendant.

See *same case, July term* 1816.

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RANDAL'S WIDOW & HEIRS vs. BALDWIN & AL.

RANDAL'S WIDOW & HEIRS vs. BALDWIN & AL.

The estate of a deceased, in the hands of his widow & heirs, is bound by a judgment obtained against his administrator.

APPEAL from the second district.

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellants instituted this suit to recover a tract of land, which they claim as the widow and heirs of Thomas Randal, deceased.

It appears from the judgment of the district court, which is admitted to contain all the material facts of the case, and is to be taken as part of the statement of facts, that the defendants and appellees claim title to, and hold the property in dispute under a sheriff's sale, made in virtue of an execution issued on a judgment obtained against Thomas Randal, in his life time, but not executed till after his death.

Perhaps all the proceedings on this judgment, from the issuing of it until the final sale of the property under the execution, were irregular. The land it seems was sold at one year's credit, and at the expiration of the time of payment, certain persons, as administrators of the estate of the deceased, brought suit against the purchasers, the defendants and appellees in the present suit.

In their answer to the first suit, they opposed the recovery of the price, by pleading a want of

title to the property, on account of certain irregularities in the judgment and execution against the deceased, Thomas Randal; and the present plaintiffs now insist on these irregularities, in order to entitle themselves to the recovery of the land, as having been illegally sold, and the consequent absence of title in the defendants and appellees.

The administrators of Thomas Randal's estate, now claimed according to their respective rights, by his widow and heirs, having been regularly appointed under the laws of the country, as they then existed, all acts legally performed by them in respect to the estate of the deceased, ought to be considered as valid and binding on his heirs. It was their duty to sue for and recover, if possible, all debts due to the estate, and to pay such debts as he owed. Accordingly suit was brought against the present defendants and appellees as above stated, and they having put in issue the title to the land claimed under a sheriff's sale, made by virtue of an execution which possibly issued illegally, a court of competent authority has decided in favor of the legality of the title by compelling the then and present defendants to pay the price. We are of opinion that the district court was correct in considering the first judgment as conclusive against the present

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plaintiffs and appellants, and as having the force and effect of a prior judgment, between the same parties, and on the same matter in dispute: for to this end the administrators fairly represented the persons who now claim the estate.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Duncan for the plaintiffs, *Turner* for the defendants.

BLANQUE vs. *PEYTAVIN & AL.*

APPEAL from the first district.

The sentence of a foreign court of admiralty is conclusive as to the national character of the ship.

DERBIGNY, J. delivered the opinion of the court.* The plaintiff and appellant, as owner of the brig James Rinker, of New-Orleans, and her cargo, condemned at Tortola in the year 1805, brought this action against the defendants and appellees, as underwriters, to recover the amount by them insured. They resist the claim on the ground that the property was not neutral, as warranted.

On that question, an important question first presents itself: whether the sentence of a foreign court of admiralty pronouncing the pro-

* MARTIN, J. did not join in this opinion, having been of counsel in the cause.

perty captured to be enemy's property is conclusive evidence of that fact.

This interesting question, after having been several times debated in the courts of the United States, was finally settled by the supreme national judiciary, who pronounced it to be law, that the sentence of a foreign court of admiralty is conclusive evidence of the fact. *Croudson* vs. *Leonard*, 4 *Cranch* 434.

It is contended by the defendants that this decision ought to be given not only in the courts of the United States, but also those of the particular states: because it is grounded on the law of nations, a law which reigns over the whole of the United States as one national body, and ought to be construed in the same manner throughout the union.

On the part of the plaintiff, it is maintained that the decision of the supreme court is not grounded on any of these general principles universally recognised by all nations, but on a rule adopted in England and proscribed in other countries; that as such it ought not to be considered as an adjudication of what the law of nations generally is on similar subjects, and that its authority ought to be confined to such of the states, the particular laws of which are not repugnant to the adoption of that rule. That there exists here

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positive laws which forbid its introduction, and that the decision of the supreme court of the United States cannot therefore be considered as binding in this instance.

It is obvious that the first question to be settled here is whether or not the doctrine established by the supreme court of the United States is conformable to the rules of that general system of national justice, which governs the conduct of all civilized nations towards each other. For, if we find it grounded on these principles, the consequence must inevitably follow that the authority of the decision ought to be the same over all the union.

The principle of the law of nations, with respect to foreign judgments generally, is that when they have been pronounced by a competent court, they ought not to be inquired into, but ought to be every where deemed conclusive between the parties. *Vattel b.* 1, *ch.* 7, *art.* 84, *Martens b.* 3, *ch.* 3, *sect.* 20.

To this rule a sovereign may refuse his assent, and in that case the foreign judgment is without force in his dominions. But, if such refusal has not taken place, the sovereign is supposed to have acquiesced in its observance. By an application of this rule to sentences of foreign courts of ad-

miralty, they are deemed conclusive against all the world, because by a fiction of law every body is supposed to have been made a party to a suit which is prosecuted *in rem*, and in which all persons interested are invited to appear as claimants.

The limitations and modifications, to which this doctrine is subject, are considerations foreign to the present inquiry. The only question here is whether the principle established by the supreme court of the United States, as to the conclusiveness of sentences of foreign courts of admiralty be derived from an application of the law of nations to these sentences: and as one can feel no hesitation to say that it has no other origin, enough is ascertained.

Of the extent or authority, which judgments of the supreme tribunal of the country, declaring the law of nations, ought to have, there can be hardly any doubt. Whatever be the jurisprudence of other governments, the United States, as a nation, can have but one rule of conduct towards the others. In that code of national rights, called the law of nations, each nation is considered as an individual: the United States are one, the particular states are nothing.

It has been argued that in France the law of nations on this particular subject is not in force:

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and as Spain is generally governed by the same system of laws which prevail in France, it has been inferred that in Spain also sentences of foreign courts of admiralty are deemed conclusive. We may go further and suppose that by the positive laws of Spain such sentences are considered as not existing: and yet this will not make the least alteration in the position here established. For whatever could be the understanding of the law of nations in Louisiana, while under the government of Spain, the moment it was annexed to the territory of the United Sates, it became a part of that body which forms the American nation, which can have but one scale to weigh the law of nations.

We deem it unnecessary to weigh the reasons on which the doctrine established by the supreme court of the United States is founded: after having said that we consider this decision as binding, we need only refer to it and pronounce in conformity thereto.

It is ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Moreau for the plaintiff, *Duncan* for the defendants.

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GRAY & AL. vs. LAVERTY & AL.

GRAY & AL. vs. LAVERTY & AL.

A judgment referring to no law, & in which no reason is adduced, is null.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court.

The judgment of the district court is in the following words "it is ordered that judgment be entered in favor of the petitioners, for the sum of $635, 81, together with costs of suit to be taxed" no law is cited: no reason adduced: and the defendants argue that the judgment is unconstitutional and therefore a mere nullity.

The constitution, *sect.* 12, *art.* 4, has provided that "the judges of all courts within the state shall, *as often as it may be possible* so to do, IN *every* definitive judgment, refer to the particular law on which such judgment may have been rendered, and *in* ALL *cases* adduce the reasons on which their judgment is founded."

The appellees contend that it suffices to adduce reasons *orally* in giving judgment, that they need not be embodied in the judgment itself; and that, admitting this to be necessary, the omission is an error or fault of the judge, for which an innocent suitor is not to suffer.

The constitution requiring a reference *in every* definitive judgment to the particular law on which it is bottomed, it is clear that the refer-

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ence ought to make *part* of it: since it is to be IN *it*. If the judgment be written and the reference oral, the latter cannot be said to make part of, to be *in* the former. But, this reference is required *as often as it may be possible*, only. Now, when it is not made, those who are to pass on the conduct of the judge, in case he be prosecuted therefor, may make a *strict* inquiry, but a court from whom it is required to reverse a judgment, may fairly conclude, even when the particular law is obvious, that it was impossible to the judge to refer to it, on the score of his having been ignorant of it. So a good judgment rendered, according to the light of the judge's understanding, ought to be supported.

The reasons, however, are to be adduced in all cases: *ils devront dans tous les cas les motiver*. The ignorance of a particular law is possible, in a judge not bred to the profession: it may exist even in others: but it can never be presumed that a judgment was rendered without the judge knowing the *reasons*, which determined him.

It is said that the reference to the law is required to be in the judgment, but that the reasons are required to be adduced only, without saying that they shall be so *in* the judgment. We think the distinction cannot be admitted. If a doubt a-

maimed; it would vanish on a reference to the French part of the constitution, which requires the judgment to be *motived, reasoned*, one which contains, adduces the motives or reasons.

We conclude that a judgment which does not contain any of the reasons which influenced the court rendering it, is unconstitutional. Need we add that whatever is unconstitutional is void? If a judgment be rendered, if a law be passed, in any other, than the legal, language—if an indictment does not conclude, *against the peace and and dignity of the state*—if a process be not in the name of the state, can they have any effect? Every power in our government is derived from the people; they delegated it by the constitution: and every provision that a particular mode shall be followed, in the execution of the power vested, is a qualification of that power, viz: that it shall not be exercised in any other manner.

The judgment before us being an unconstitutional one, must be annulled, avoided and reversed, and the cause is remanded to the district court, with directions to the judge to give judgment thereon, according to the constitution by referring therein, if possible, to the particular law

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on which it is grounded, and at all events to adduce the reason on which it is founded.

Grymes for the plaintiffs, *Hennen* for the defendants.

DUKEYLUS' SYNDICS vs. *DUMONTEL & AL.*

Syndics cannot prosecute a suit, till the proceedings of the creditors appointing them are homologated.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court* This is a case in which the syndics of the creditors of Dukeylus, a bankrupt, intervene in a suit commenced by Mary M. Dumontel against the syndic of Leboucher, another bankrupt. They claim a right to receive for the use of Dukeylus' creditors, whom they pretend to represent, a debt of four thousand dollars, which, it is contended on their part was fraudulently transferred by Dukeylus to Mary M. Dumontel, by procuring Leboucher to assume the payment of it to her, in violation of the just claims of said creditors.

Several bills of exceptions, taken by the counsel of Madame Dumontel, to opinions of the district court, given on points of law, in the course

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* DERBIGNY, J. did not join in this opinion, being Leboucher's syndic.

of the trial of the cause, come up with the record and statement of facts, and are to be disposed of, before we examine the merits of the case.

The exception which it is proper to notice first is, that taken to the opinion of the court, given in favor of the right of Trouart and Paillette, syndics of Dukeylus, to intervene in the suit.

It is admitted that the proceedings had in the case of Dukeylus, against his creditors, were exhibited, and shew that the persons claiming to intervene were, in the first instance, provisional syndics of the estate of said Dukeylus—that afterwards, at a meeting of the creditors, syndics were nominated, whose nomination has never been approved or confirmed by a court of competent jurisdiction: the proceedings of the creditors having never been homologated. It being admitted, by the counsel of the intervening party, that the functions of their clients, as provisional syndics, ceased on the nomination by the creditors to the trust of permanent syndics, it is necessary to inquire into the rights, powers and duties of those who hold and exercise the former description of trust. The correctness or error of the opinion of the court below, on this point, is therefore to be determined by the solution of the following question: can syn-

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dics, nominated by the creditors, proceed as legal administrators of the estate of an insolvent debtor, before the approbation and confirmation of their nomination? When nominated by the creditors of an insolvent, in case of a *cessio bonorum*, syndics are, under another denomination, the *curatores*, in such cases known to the Spanish law, whose nomination on the part of the creditors must be approved and confirmed by a court or judge of competent authority. The nomination is good, if made by a majority of the creditors, in amount, though it should not be in number; the judge ought to approve and confirm it, if he considers the persons fit for the trust, and there has been no fraud or collusion in the business.

Until the approbation and confirmation of the judge, we discover no power conferred by law on the administrator, no duty required of him. But, after the confirmation, he is considered in the double capacity of depository and curator *ad bona*, and his powers and duties are fully laid down and described. The inconvenience which may result from the want of some person to administer on the estate of the bankrupt between the period of the cession and the legal appointment of syndics is strongly pressed on the court by the counsel of Dukeylus' syndics.

we do not perceive it, in the same dangerous light in which it appears to them: and, if we did, it is not for us to apply the remedy, as it appears to be a case unprovided for by law. Altho' the authority of syndics is principally created by the appointment of the creditors, for whose interest they are bound to act, and is somewhat analogous to that of an agent or attorney, yet, we are of opinion that it is incomplete and will not warrant them in prosecuting actions for the benefit of those by whom they are nominated, without the approbation and confirmation of a competent tribunal.

It is further insisted on, by the counsel of the intervening party, that their want of capacity to prosecute their suit, ought to have been especially pleaded by Madame Dumontel, and that she cannot legally avail herself of their want of authority under the general denial in her answer.

On this, it may be observed that the law regulating the practice of our courts, in civil cases, requires the defendant to answer every material facts, stated in the petition, without evasion. A plaintiff claiming the interference of a court of justice, either to ensure his rights, or redress his wrongs, must allege *and establish by legal*

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proof, all facts necessary to the support of his case, when they are denied by the defendant. It is a principle of law, that a person, who sues in right of another, is bound to shew his authority. The general denial, in the answer of Madame Dumontel, is sufficient to require of the appellees, to shew full power and authority to proceed in the suit, as syndics or administrators legally empowered. This they have not done. We are therefore of opinion that the district court erred in sustaining the petition of the intervening party: their appointment as syndics, not having been confirmed by a competent tribunal.

In consequence of which, it is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the petition of the intervening party be dismissed with costs: and it is further ordered, that the cause be remanded, for trial between the original parties, with instructions not to allow the syndics of Dukeylus to intervene in the cause, before their appointment as syndics, shall be regularly approved and confirmed.

Moreau for the plaintiffs, *Depeyster* for the intervening party.

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WHITE & AL. vs. HOLSTEN & AL.

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A marriage, celebrated in North Carolina may be proved by parol evidence.

A witness testifying against his interest is not to be rejected.

Parol evidence ought not to be admitted to destroy a title to real property.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants claim certain property, in the possession of the defendants and appellees, as the inheritance of D. White, deceased, whose legitimate descendants and forced heirs they state themselves to be.

They are opposed on several grounds.

1. The legitimacy of the plaintiffs is denied.

2. The will of D. White is set up by which Sylvia Turnbull, Holsten's wife, is instituted sole heiress.

3. The property is claimed, under a title independent from D. White's will, as belonging to the said Sylvia.

In the course of the trial below, sundry exceptions were taken, on both sides, to opinions delivered on points of law.

I. The first was on the admission of parol evidence of the filiation of the plaintiffs. As their legitimacy depends on establishing the marriage of their mother with D. White, who is admitted to be their father, which is said to have taken place in North Carolina, we think that the district court was correct in permitting the plain-

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tiffs to prove by parol evidence the fact of marriage, or such circumstances from the existence of which, it is legally presumed, according to the laws of North Carolina.

II. A second exception was taken by the defendants to the opinion of the district court in overruling a motion to dismiss the suit, on the ground, that admitting them to be legitimate children of D. White, they are not his only heirs, and consequently have no right to demand the whole inheritance. The principal object of the plaintiffs, in the suit, being to annul the will of the deceased, and to be allowed to partake of the succession, by establishing themselves his legitimate descendants, and such heirs of his as cannot agreeably to our laws be deprived of his inheritance, we are of opinion that the district court did not err in overruling the motion.

III. The exception taken by the plaintiffs' counsel to the opinion of the district court, in admitting the deposition of Mrs. Turnbull is certainly not well founded, on the ground taken, viz. that she purchased some of the slaves included in the inventory of D. White's estate: for if her testimony went to establish a title to them in any other person than the deceased or herself, it would be testifying against her own interest; a circum-

stance, which can never be opposed to the competency or credibility of a witness. But that part of her deposition, which has a tendency to prove a title in her deceased husband to any part of the property in dispute, is inadmissible, because she may be presumed to be entitled to one half of it, as belonging to the community of matrimonial acquets: she is therefore so far interested and consequently an incompetent witness.

The last exception is taken by the plaintiffs, to the admission of parol evidence of any other title to the property in dispute, in the appellees, except that which they derive from the will of White: 1. Because they have not alleged it in their answer. 2. Because they have accepted his estate, agreeably to an inventory made by order of a competent tribunal.

The answer contains a general denial of all the allegations in the petition. It asserts the validity of White's will, and the defendants state "they are justly and legally entitled to "the ownership and disposition of all the pro- "perty whereof he died possessed." If the will be considered as good and valid *in toto*, then the defendant Sylvia is entitled to all the property of the testator, being instituted his sole heiress, and the latter clause in the answer be-

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comes wholly useless in the defence. It ought therefore to be taken as a claim of title, distinct from that derived under the will. But, if it did appear clearly that Mrs. Holsten has accepted the property, as an inheritance from D. White, we are of opinion that she ought to be estopped from pleading or proving any title in herself, distinct or independent from his testament. This however, is not found to be her situation; the property was placed in the hands of her husband, on giving security to answer for it, according to what might be decided by the tribunal of the Spanish government, then exercising jurisdiction on that part of the state.

In this case, as in all others, the persons claiming the estate are bound to make good their title against the legal possessor, and in opposition, the latter has a right to set up and prove, by legal means, any title which may defeat the claim of the plaintiff. But, it is the opinion of this court, that no parol evidence ought to have been admitted to destroy the title of the testator to immoveable property and slaves, and altho' it may have been properly received, as it respects the mere personal property, yet, it appears to us so vague, undefined, and uncertain, as to weigh nothing against the continued pos-

session and exercise of ownership by White, during his life, even to the solemn act of attempting to dispose of all his property by will.

Let us now examine the only remaining questions: the legitimacy of the plaintiffs and appellants, and the validity of the will.

On the question of legitimacy, which is one of fact, there is some contrariety of evidence, yet we think that the balance is clearly in favor of the plaintiffs and appellants.

The will it appears was made and published with all the formalities required by law, and *quo ad* its form is good and valid. But, according to the laws of the place, where the testator died, having legitimate descendants, he could not dispose by testament of more than one fifth part of his property to their prejudice. Here, it may be remarked that the same rules in relation to heirship prevail in this state. So far then as the will under consideration pretends to dispose of more than one fifth of the estate of the testator, it is illegal and invalid. It therefore ought to be and is hereby declared null, and void, as to every disposition contained in relation to the *legitime* or four fifths of the testator's estate,

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of which he could not legally deprive his legitimate descendants and forced heirs: agreeably to these premises, the succession of D. White must be distributed in such a manner, as to give his legitimate descendants four fifths, and one fifth to the appellant Sylvia Holsten, being the disposable portion of the ancestor, which she rightfully holds under his will.

It is ordered, adjudged and decreed, that the judgment of the district court, be reversed and annulled, and it is further ordered, adjudged and decreed, that the defendants and appellees do account with, deliver and pay over to the appellants, Joseph White and Wm. White, their proportion of four fifths of the estate, both immoveable and moveable, of David White, their ancestor, as his forced heirs.

Livingston for the plaintiffs, *Robinson* for the defendants.

LAFON vs. *SADDLER.*

The tacit lien of a builder is not lost, by his neglect to record the contract for the building.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the Court. The petition states that the plaintiff, is a

creditor of J. Godwin, for $345, the balance of a sum due on a notarial contract for building a house—that he brought suit against Godwin, who, *pendente lite*, sold it to the defendant. The answer denies every thing, and avers that the defendant is a purchaser without notice. The facts stated in the petition being proven, there was a judgment for the plaintiff, and the defendant appealed.

The statement of facts admits the purchase and payment of the price by the defendant, that the tacit or legal mortgage of the plaintiff on the house, as the builder of it, was never recorded, as the act of 1813 ch. 49. is stated to require—that the defendant was not made a party to the suit, brought by the plaintiff against Godwin—That Godwin has failed, and that the sum claimed, is due to the plaintiff, for work done on the house.

The plaintiff's counsel contends, that his is a privilege or legal mortgage, which has its effect against those persons, without being stipulated for, *Civil code* 470, *art.* 75, and that the words of the act of 1813, do not extend to the destruction of liens, which, not arising from any written contract or stipulation, are not susceptible of being recorded. The expressions of the

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act are "*all liens, of any nature whatever,* HAVING *the effect of a legal mortgage, which shall not be recorded against the provisions of this act, shall be null and void.*" The title of the act, is for the recording of certain acts, therein mentioned, which shews that the intention of the legislature, was to compel creditors to give notice of their *acts*, not to alter the law, so as to destroy the lien of builders, &c. in cases in which a privilege or lien was not *expressly* stipulated. The plaintiff's lien, it is contended, arising before the passage of the act, could not be supposed to have been destroyed by the requisition of a formality, which could not be complied with.

The defendant's counsel replies, that the petition shews, that the plaintiff's claim is grounded on a notarial act, which was susceptible of being, and is admitted not to have been, recorded.—That contracts are the laws, that govern the parties.—That the tacit provisions of the law, always yield to the express stipulation of the party, whom the law intended to protect.

This court is of opinion, that the judgment given below is a correct one. The plaintiff hav-

ing built a house for Godwin, had *ipso facto* by law a tacit lien, or privilege to have it sold for his payment. His having reduced to writing the contract, which fixes the manner, in which the house was to be built, and the mode of payment, does not affect his right. If a man has a right to a thing by law, and under a contract, which does not modify his right, he will be allowed to avail himself of his stronger title, that which results from the law. If the heir has the estate which the law casts on him by descent, devised on him, he will be in, rather as heir, than as devisee. Here the petition alleges the plaintiff's privilege, as a builder, for work, materials, &c. bestowed on a house. The statement of facts, admits the nature and extent of the claim as set forth; the legal consequence must follow, that the debt is a privileged one on the house. There is no need of bringing the notarial instruments into action.

The act of 1813, had no other object, than to prevent the effect of *latent acts* or instruments—or to guard against the supposition or forgery of *acts*, by which the interests of third persons might be affected, not to destroy the *tacit* lien *which the law gives* to workmen and others, *ipso facto*, by the labour or materials which they bestow.

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If the contract before the notary, was necessary to the plaintiff's recovery, the present defendant, might perhaps have resisted its introduction: but it does not appear necessary. It is admitted, in the statement of facts, that the work was done by the plaintiff, on the house as charged, and that the sum is justly due him by Godwin.—It requires the aid of no written instrument, to establish the consequent privilege, if it exist without any instrument: the defendant complain that no instrument was recorded.

It is ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Hennen for the plaintiff, *Smith* for the defendant.